

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

VINCENT A. NYSTI,

Defendant.

No. CR-10-0162-RHW

**ORDER RE: PRETRIAL
MOTIONS**

The Court held a pretrial conference in this matter on November 21, 2011. Present for the Government was Rudy Verschoor; Jaime Hawk appeared on behalf of the Defendant, who was also present. The Court heard argument on several pending motions, and it rules as follows:¹

Motion to Dismiss: For the reasons discussed at the hearing, the Court finds the Indictment, which tracks the statutory language of the offense, sufficiently appries Defendant of the nature of the charges and allows him to prepare an adequate defense. United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007). The motion is DENIED.

¹The Court ruled on many of these motions from the bench. This written order memorializes those oral rulings.

1 **Motions in Limine:**

2 **Testimony Concerning “Serious Bodily Injury:”** Although no witness can
3 give an opinion as to an ultimate issue of law, it is impractical to prohibit the use of
4 common descriptive terms in testimony. *See United States v. Two Eagle*, 318 F.3d
5 785, 793 (8th Cir. 2003) (“Medical and legal terms often overlap, and a medical expert
6 cannot be expected to use different words merely to avoid this specific problem.”).
7 The Court will instruct the jury at the conclusion of trial, and if requested during
8 testimony as well, that the determination of the degree of injury is for it to decide. The
9 motion is DENIED.

10 **Testimony About Victim’s Pain:** The Government has provided discovery,
11 primarily medical records, that describes the injuries sustained by the victim. The
12 Government’s expert disclosure indicated that she will provide testimony that two of
13 the victim’s injuries were life-threatening, but that the victim’s skull fracture was not.
14 At the hearing, the Government stated that it would argue that the skull fracture and
15 other injuries qualify as a “serious bodily injury” because the jury can infer that the
16 victim endured extreme physical pain.

17 Because the Government did not disclose that it would be providing *expert*
18 testimony on the pain resulting from the skull fracture, it is foreclosed from
19 introducing this testimony at trial. The parties shall brief whether the jury is permitted
20 to conclude from generalized testimony about injuries sustained whether extreme
21 physical pain resulted. The Court GRANTS the motion, in part, and will limit expert
22 opinions concerning pain to those disclosed by the Government in discovery.

23 **Photographs of Victim’s Bruising:** The Government seeks to introduce
24 pictures of the victim taken while she was hospitalized for the injuries at issue. The
25 Court finds these photographs generally relevant, but it RESERVES RULING on
26 whether they are substantially prejudicial or cumulative until trial. The Government
27 has disclosed to the Court and Defendant the list of pictures it intends to introduce,
28 and the Defendant shall submit any objections before trial.

1 **Terms “Victim,” “Child Abuse,” and “Life-Flighted:”** The Court DENIES
2 Defendant’s motions to exclude reference to these terms with leave to renew at trial
3 if a particular use is contended to be prejudicial.

4 **Defendant’s Statement:** Defendant seeks exclusion of his written statement
5 to police as hearsay. Though the statement is actually a summary of the police officer's
6 notes taken during his interview, Defendant signed the document. The Court
7 previously denied Defendant’s motion to suppress this statement, finding that police
8 had properly Mirandized Defendant, he had not invoked his right to silence before
9 signing it, and that the statement was not a product of coercion. (ECF No. 105).

10 Defendant says this written statement, paraphrasing his oral statements to
11 police, is dual-layered hearsay. But “a signed statement, even if written by another in
12 another's words, would be adopted as the party's own if he signed it, because signing
13 is a manifestation of adopting the statement.” United States v. Orellana-Blano, 294
14 F.3d 1143, 1148 (9th Cir. 2002). Here, Defendant signed the statement at the
15 conclusion of the interview, thereby adopting the officer's paraphrasing. The written
16 statement it is admissible as an admission by a party-opponent, FRE 801(d)(2)(B), and
17 the motion is DENIED.

18 **Statements by Medical Personnel to Police:** The Government indicated that
19 it would not seek admission of statements made to police by medical personnel. This
20 motion is DENIED, as moot. The Defendant can renew his objection at trial if
21 necessary.

22 **Photographs of Bathtub:** The Defendant had originally objected to
23 photographs depicting unidentified red marks. The Government stated at the hearing
24 that it would offer photographs of the scene without the marks. The motion is
25 DENIED, as moot.

26 **Witnesses:** The Defendant seeks the exclusion of testifying witnesses under
27 FRE 615, and the Government has no objection. The Government informed the Court
28 that it wishes for one of its witnesses to testify via videoconference. The parties shall

1 confer with each other, and if the Defendant does not stipulate to such testimony, the
2 Government shall brief the Court whether it has the discretion to grant its request.

3 **Motion for Reconsideration (Prior Acts Evidence)**: Finally, the Defendant
4 moves for reconsideration of a previous order admitting prior bad acts evidence. The
5 Government asked to introduce: (1) victim's broken leg, suffered in July, 2010; (2)
6 testimony that two babysitters witnessed bruises on the victim around ten days before
7 the alleged assault; (3) another babysitter's testimony that she saw Defendant handle
8 the victim roughly and then "heard" Defendant throw the victim into bed; and (4) a
9 burn the victim sustained while lying on the hood of a car when her mother was
10 changing her diaper. The Court admitted the evidence about the broken leg, the
11 bruising seen by the babysitters, the rough handling, and the burned hand, finding that
12 each goes to intent and absence of accident under FRE 404(b). It reserved ruling on
13 the admissibility of the babysitter's belief that Defendant threw the victim into bed
14 until a foundation could be laid at trial.

15 **1. Admission Under 404(b)**

16 Prior act evidence is admissible if: (1) it proves a material element of the
17 charged offense; (2) the prior act is not too remote in time; (3) the evidence is
18 sufficient to support a finding that the defendant committed the act; and (4) in cases
19 where knowledge and intent are at issue, the act is similar to the offense charged.
20 United States v. Holler, 411 F.3d 1061, 1067 (9th Cir. 2005). The Defendant renews
21 his objection that the Government cannot carry its burden on the third-prong because
22 other individuals were present and could have caused the prior injuries. Although the
23 Court is not required to make a preliminary finding that Defendant committed these
24 prior acts, it must determine that there is "sufficient evidence" for a jury to so
25 conclude before admitting the evidence under Rule 404(b). Huddleston v. United
26 States, 485 U.S. 681, 689-90 (1988).

27 **a) Bruises and rough handling**

28 The child was shown to have bruises in multiple places on her body when she

1 was examined by medical personnel while she was hospitalized for the injuries
2 charged in this case. These bruises may be evidence of the assault and are admissible
3 as part of the whole event of October 20, 2010. They also may be admissible under
4 Rule 404(b) to show that the injuries in this case were not the result of accident, as the
5 child was in the exclusive care of Defendant for much of that day. United States v.
6 Boise, 916 F.2d 497, 502 (9th Cir. 1990) (child's prior injuries admissible under Rule
7 404(b) where defendant was the primary care giver at the time injuries occurred).

8 In addition, around October 10, 2010, the child's babysitters observed bruises
9 on her body. (ECF No. 43, at 2). One saw the defendant roughly handling the child
10 while carrying the child from a car to her bed. (Id.) The rough handling is admissible
11 under Rule 404(b) because a witness links Defendant directly to the act. United States
12 v. Lewis, 837 F.2d 415, 418-19 (9th Cir. 1988) (prior abuse admissible under Rule
13 404(b) where witnesses testified they saw defendant follow victim into a room
14 carrying a belt). The bruises observed by the babysitters are admissible because the
15 jury could conclude that they occurred while the child was under the care of either the
16 mother or the Defendant. Boise, 916 F.2d at 502.

17 The extent of the testimony concerning what the babysitter heard in another
18 room will be considered at trial.

19 **b) Broken leg**

20 In July of 2010, the child was treated for a broken leg. The child had been in the
21 care of the Defendant for the two days prior to the visit to the hospital and in the care
22 of the mother and the Defendant on the day of the hospital visit. (ECF No. 43, at 2).
23 The mother denies breaking the child's leg. From this, a jury could conclude that the
24 break occurred while the Defendant was caring for the child alone or with the mother.
25 *See* Boise, 916 F.2d at 502.

26 **c) Burned hand**

27 The child also sustained burns on her hand while the mother was changing her
28 diaper on the hood of a car. (ECF No. 43, at 2). The Government's proffer does not

1 link this event to Defendant at all, and it is therefore not admissible under Rule 404(b).

2 **2. Admission to Show Injuries Not an Accident**

3 Irrespective of their admissibility under Rule 404(b), all these prior injuries are
4 relevant to show that the injuries here are not the result of an accident. In Estelle v.
5 McGuire, which also concerned admission of prior acts of abuse, the Supreme Court
6 reversed the Ninth Circuit's determination that evidence of prior injuries was
7 irrelevant because the Government could not link the defendant to them. The Supreme
8 Court majority held that the evidence was relevant to show that "certain injuries are
9 a product of child abuse, rather than accident, . . . even though it does not purport to
10 prove the identity of the person who might have inflicted those injuries." 562 U.S. 67,
11 68 (1991). Because the Government was required to prove that the murder charged
12 was the result of an intentional act, the evidence was probative on the question of the
13 intent of the person responsible. Although Estelle was before the Court on a habeas
14 petition, and thus involved analysis of the Due Process Clause rather than the federal
15 evidentiary rules, this Court finds the reasoning equally applicable here.

16 As in Estelle, the Government here must show that the child's injuries were the
17 result of an intentional act. Therefore, the Court finds *all* the prior acts evidence, even
18 the burned hand not linked to Defendant, relevant and admissible to show that the
19 child's injuries were the result of an intentional act of *someone*, and not an accident.
20 FRE 401; 402. If requested, the Court will give appropriate limiting instructions
21 concerning the evidence admitted under 404(b) or to show that the injuries, who ever
22 inflicted them, were not the result of an accident. Counsel should submit any
23 requested instruction on or before the morning of trial.

24 **3. Rule 403**

25 The Court has considered the prejudicial effect of the admission of the
26 challenged evidence in relation to its probative value. Here, the probative value of this
27 evidence is high where the victim, a three-year old child, cannot testify. Boise, 916
28 F.2d at 502 (evidence of past abuse "highly probative" on question of intent and

1 absence of mistake). These prior acts are the best evidence that the injuries suffered
2 in this case are intentional, and their probative value is not substantially outweighed
3 by prejudice to the Defendant. FRE 403.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. The Defendant's Motion to Dismiss (ECF No. 122) is **DENIED**;

6 2. The Defendant's Motions in Limine (ECF No. 120) are **GRANTED and**
7 **DENIED**, in part;

8 3. The Defendant's Motion for Reconsideration (ECF No. 125) is **GRANTED**
9 to the extent provided in this Order.

10 4. The Government's Motion for Extension of Time (ECF No. 127) is
11 **DENIED**, as moot.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
13 order and to provide copies to counsel.

14 **DATED** this 23rd day of November, 2011.

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16
17 /s/ Robert H. Whaley
18 ROBERT H. WHALEY
19 United States District Judge
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